80-946

No. 80_____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUISIANA AIRCRAFT, INC.,

Petitioner,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

v.

C.W. AYCOCK, SR., ADMINISTRATOR FOR THE ESTATE OF JAMES HENRY AYCOCK, DECEASED,

and

ALIOUS S. ASHLEY, JOSEPHINE THOMPSON ASHLEY, MARY ELLA OWENS, SADIE LEE LINN, MILMA JOSEPHINE WISELOGEL, THELMA MAY FURLOW, LINBY RUTH BLAKLEDGE, BESSIE FAY STRAW, MARTHA ANN BONE, AND WILLIAM M. ASHLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

In this diversity case, did the United States Court of Appeals for the Fifth Circuit err in disregarding the Mississippi Supreme Court's long-standing interpretation that jurisdiction over a nonresident defendant exists under the Mississippi Long Arm Statute, §13-3-57 Miss. Code Ann. (1972), only when the nonresident defendant performs a purposeful act in Mississippi and the cause of action aries from, or is connected with, that purposeful act, *Mladinich* v. *Kohn*, 164 So.2d 785, and in holding instead that jurisdiction exists when the nonresident defendant has only minimum contacts with Mississippi and the cause of action is only incident to business done by the defendant with a Mississippi resident?

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The Petitioner, Louisiana Aircraft, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 19, 1980.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 617 F.2d 432. (App. 2a). The denial of rehearing is not reported. (App. 1a). The opinion of the United States District Court for the Southern District of Mississippi, rendered on June 21, 1978, is not reported. (App. 7a). The denial of rehearing is not reported. (App. 26a).

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 19, 1980. A timely petition for rehearing was denied on August 13, 1980. Upon application of counsel for the Petitioner, the Honorable Lewis F. Powell, Associate Justice of the Supreme Court of the United States, issued an Order on November 13, 1980, extending the time in which to file a Petition for Writ of Certiorari in this cause to and including December 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

III.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND UNITED STATES CONSTITUTION — FOURTEENTH AMENDMENT

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§13-3-57, Mississippi Code Annotated (1972).

Service when defendant is nonresident doing business in state-appointment of Secretary of State as agent. (App. 28a). §79-1-27, Mississippi Code Annotated (1972).

Foreign corporations subject to suit in this state. (App. 30a).

IV.

STATEMENT OF THE CASE

On January 19, 1975, an airplane, a Piper Navajo aircraft, F.A.A. number N-1FP, crashed in Mobile County, Alabama. At the time of the crash, John Thomas Ashley was flying the airplane and James Henry Aycock was a passenger. This litigation is an attempt to recover damages for their deaths and, by way of subrogation, for the collision damages to the airplane.

Faulkner Concrete Products Company of Hattiesburg, Mississippi, owned the airplane which was insured by the Insurance Company of North America (INA). Louisiana Aircraft, Inc., had sold the airplane to Faulkner and after the expiration of all warranties and unconnected with the sale, had performed certain maintenance and F.A.A. inspections on the aircraft in Baton Rouge, Louisiana.

After the crash INA paid Faulkner One hundred Forty thousand Dollars (140,000.00) for collision or hull damage to the plane and paid the heirs of Aycock and Ashley Two hundred thousand Dollars ($200,000.00) in

exchange for their releases. INA then filed suit in the United States District Court for the Middle District of Louisiana, Cause Number 76-7, against Louisiana Aircraft, Inc., alleging negligence in a certain inspection and maintenance of the airplane in Baton Rouge, Louisiana, and sought recovery of the One hundred Forty thousand Dollars ($140,000.00) paid to Faulkner and of the Two hundred thousand Dollars ($200,000.00) paid to the Ashley heirs and the Aycock heirs.

On July 21, 1976, C. W. Aycock, Sr., Administrator of the Estate of James Henry Aycock, deceased, filed this suit in the United States District Court for the Southern District of Mississippi, Hattiesburg, Division, Cause Number H-76-76(R), against Louisiana Aircraft, Inc., alleging damages for the wrongful death of James Henry Aycock, deceased. Jackson Air service, Inc. was named in said action as a Garnishee-Defendant in an attachment count in the Complaint.

On August 12, 1976, Louisiana Aircraft, Inc. appeared specially in the Mississippi action, and moved the Court to dismiss the personal action on jurisdictional grounds and the attachment action on summary-failure to state a claim grounds.

Prior to a hearing on those motions, on October 13, 1976, the heirs of Ashley and INA moved the Mississippi U. S. District Court for leave to intervene in the Mississippi action on permissive grounds of common question of law and fact. Over the objection of Louisiana Aircraft, Inc., United States Magistrate John Roper allowed the intervention of both movants on December 20, 1976.

On March 17, 1977, INA, heirs of Ashley, and C. W. Aycock, Sr., filed a consolidated Complaint in this action against Louisiana Aircraft, Inc., Defendant, and the Insurance Company of the State of Pennsylvania, Garnishee-Defendant. Jackson Air Service, Inc. was not mentioned in the consolidated Complaint, has not since been mentioned, and was apparently considered by Judge Russell (the attachment never being perfected) to have been voluntarily non-suited from the proceedings. The consolidated Complaint mentioned above alleged damages for hull damages or collision loss and wrongful death of the two occupants against Louisiana Aircraft, Inc. and attachment of a liability policy of insurance written by the Insurance Company of the State of Pennsylvania for Louisiana Aircraft, Inc., and asserted personal jurisdiction over Louisiana Aircraft, Inc. on tort, contract, and doing business grounds and in rem jurisdiction over the liability policy written by the Insurance Company of the State of Pennsylvania.

Louisiana Aircraft, Inc. then appeared specially again to contest the jurisdiction of the Court in this action over its person, and the Insurance Company of the State of Pennsylvania moved for summary judgment or dismissal for failure to state a claim on the attachment. On August 8, 1977, Judge Dan Russell heard arguments by counsel on said motions. On May 26, 1978, and again on June 16, 1978, Judge Russell issued written opinions on the motions of Louisiana Aircraft, Inc. and the Insurance Company of the State of Pennsylvania. However, subsequent to the first opinion but before the second opinion, on June 1, 1978, the heirs of Ashley, Plaintiff-Intervenor, and C. W. Aycock, Sr., original Plaintiff, moved the Court for Stay of Entry of Order on the Court's first opinion, leave to intervene, and, in the alternative, transfer of the action to the United States District Court of Louisiana, Middle Division.

Judge Russell commented on the Motion to Stay in his second opinion dated June 16, 1978, and found it non-meritorious, directing entry of an Order based upon his opinion. On June 20, 1978, Judge Russell executed his order on the motions of Louisiana Aircraft, Inc. and the Insurance Company of the State of Pennsylvania to dismiss on jurisdictional and summary grounds, said order being filed on June 21, 1978. This order was the basis for Appellants' appeal to this Court.

On December 29, 1978, Appellee, noting the questionable finality of Judge Russell's Order of July 21, 1978, moved Judge Russell's Court for a Rule 54(b) Certificate and Final Judgment based on said certification to insure jurisdiction of this Honorable Court. Agreeing with Appellee's concern over the finality of Judge Russell's Order, Appellants moved Judge Russell for reconsideration of the jurisdictional issue based upon the Mississippi Supreme Court decision of *Arrow Food Distributors, Inc.* v. *Love*, 361 So.2d 324 (Miss. 1978). Judge Russell refused to revise or amend his Order of July 21, 1978, and on January 4, 1979, certified nunc pro tunc, that final judgment on Aycock's and Ashley heirs' claims should be entered and actually entered final judgment dismissing Aycocks' and Ashley heirs' Complaint against Louisiana Aircraft, Inc. and the Insurance Company of the State of Pennsylvania. Pursuant to Rule 10 of the Federal Rules of Appellate Procedure, the Record on that appeal was supplemented by the District Court Clerk to include the Motion, Rule 54(b) Certificate and Order and Final Judgment.

On February 14, 1979, the Court sustained a motion by Insurance Company of the State of Pennsylvania dismissing that Appellee from the appeal on the grounds that no relief was sought as to them.

On May 19, 1980, the Fifth Circuit Court of Appeals issued its opinion reversing and remanding the case, finding jurisdiction present. The Petition for rehearing was denied on August 13, 1980.

The Honorable Lewis F. Powell, Associate Justice of the Supreme Court of the United States, on November 13, 1980, issued an Order extending the time within which to file a Petition for Writ of Certiorari in this cause to and including December 11, 1980.

V.

FACTS

The United States District Court for the Southern District of Mississippi dismissed the Complaint of Plaintiffs, Ashley and Aycock, due to absence of personal jurisdiction over the Defendant, Louisiana Aircraft, Inc. Ashley and Aycock appealed, and on May 19, 1980, the Fifth Circuit Court of Appeals reversed and remanded the case, finding jurisdiction to be present.

This litigation grows out of an airplane crash which occurred near Mobile, Alabama, on January 19, 1975. The plane, owned by Faulkner Concrete Products and based in Hattiesburg, Mississippi, was en route from Hattiesburg, Mississippi, to Fairhope, Alabama, at the time of the crash. The passenger on the plane, Aycock, and the pilot, Ashley, were killed in the crash. The Complaint alleged that Louisiana Aircraft, Inc., a Louisiana Corporation, not qualified to do business in the State of Mississippi, performed maintenance and inspection work on the aircraft in Baton Rouge, Louisiana, shortly before the crash, and alleged that both the maintenance and the inspection work were negligently performed.

The facts of the case are further established by the deposition of Reggie Griffith and affidavit of Reggie Griffith to the effect that Louisiana Aircraft, Inc. is a Louisiana Corporation, not qualified to do business in Mississippi, maintaining no salesmen in the State of Mississippi, owning no real property in the State of Mississippi, maintaining no bank accounts or offices in the State of Mississippi. Louisiana Aircraft, Inc. is a distributor for Piper Aircraft for south Mississippi; however, according to the deposition, this distributorship is implemented by means of independent contractors in Mississippi, and no distributorship agreement appears in the record.

The deposition of Reggie Griffith established the fact that Louisiana Aircraft, Inc. sold the airplane in question to Faulkner Concrete Products Company and that in all probability, a salesman of Louisiana Aircraft, Inc. did call upon Faulkner in Hattiesburg, Mississippi; however, the airplane was picked up by Faulkner in Pennsylvania, and no other material facts of the sale are given to reveal whether the sale was consummated in Louisiana or in Mississippi.

VI.

REASONS FOR GRANTING THE WRIT

The Decision Below Decided An Important State Question In A Way In Conflict With Applicable State Law

The opinion of the United States Court of Appeals for the Fifth Circuit alters the case law of the State of Mississippi and, by implication, overrules the landmark case of *Mladinich* v. *Kohn*, 250 Miss. 138, 164 So.2d 785 (1964). By its own admission the Court of Appeals had only one basis for its decision, and that basis was an erroneous interpretation of *Arrow Food Distributors* v. *Love*, 361 So.2d 324 (Miss. 1978).

This Court recently took the opportunity to admonish State Courts to refrain from making overly broad interpretations of the various State Long Arm Statutes. *World-Wide Volkswagen Corp.* v. *Woodson*, _____ U. S. _____, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). This Court should now seize this opportunity to restrain the United States Court of Appeals and the District Courts from making similar mistakes in interpreting these Long Arm Statutes.

The Mississippi Long Arm Statute has a provision relating to a nonresident corporation doing business in Mississippi.[1] In *Mladinich* v. *Kohn*, 250 Miss. 138, 164 So.2d 785 (1964), the Mississippi Supreme Court established a three-prong test for determining whether a nonresident corporation is doing business in Mississippi:

> "(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected

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[1] §13-3-57, Miss. Code Ann. (1972) provides in pertinent part:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by an party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee.

> with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation."

164 So.2d at 790, quoting *Tygree Construction Company* v. *Dulien Steel Products, Inc., of Washington*, 162 Wash.2d 106, 381 P.2d 245, 251 (1963). All three of these factors must coincide before a Mississippi Court may assert its in personam jurisdiction over a nonresident corporation. *Ga-Pak Lumber Company, Inc.* v. *C. V. Nalley*, 337, So.2d 1270, 1274 (Miss. 1976).

The United States District Court correctly interpreted *Mladinich* as setting forth a three-part test for the application of the doing business section of the Long Arm Statute:

> (1) The non-resident defendant must "purposely do some act or consumate [sic] some transaction" in Mississippi; (2) the plaintiff's cause of action "must arise from, or be connected with, such act or transaction"; and, (3) the assumption or jurisdiction by the forum state's court must "not offend jurisdictional motions of fair play and substantial justice. . ." 164 So.2d at 790.

(App. 16a).

The District Court then denied jurisdiction over Louisiana Aircraft. The Court stated:

> The plaintiffs charge the Defendant with negligence in leaving a screwdriver in the plane's controls. The record indicates that, even assuming such to be true, the act would have occurred in Louisiana. Thus, the Defendant *has not* done some *purposeful act* in *this State* from which Plaintiffs' cause of action arises.

(App. 16a), (Emphasis in original).

The Court of Appeals reversed this holding by asserting that jurisdiction did exist under the doing business section of the Long Arm Statute, and remanded the case to the District Court. In making this decision the Court of Appeals relied solely on an erroneous interpretation of *Arrow Food Distributors* v. *Love,* 361 So.2d 324 (Miss. 1978).

> We do not agree with the district court with respect to its construction of the doing business section of the long arm statute. We do not, therefore, comment on the court's conclusions regarding the other sections. It also is not necessary that we decide whether the district court correctly construed Mississippi cases rendered prior to its decision. Rather we hold the *Arrow Food Distributors,* v. *Love,* 361 So.2d 324, 326-7 (Miss. 1978), which was announced after the district court's ruling, requires us to reverse.

617 F.2d at 434. (App. 5a).

As noted by the Court of Appeals, *Arrow* was decided after the District Court had dismissed Louisiana Aircraft on jurisdictional grounds; however, the District Court did have the benefit of *Arrow* while considering the motion to reconsider. *Arrow* does not affect the ruling of the District Court and does not stand for the proposition announced by the Court of Appeals.

Arrow began as an attachment in chancery under a statute, §11-33-1, Miss. Code Ann. (1972), which has recently fallen from Constitutional grace, *Mississippi Chemical Corp.* v. *Chemical Construction Corp.*, 444 F. Supp. 925 (N.D. Miss. 1977). Arrow Foods, the Defendant, answered the bill and also raised personal jurisdictional questions. At that moment, the Chancery Court assumed jurisdiction. By answering the Bill, Arrow Foods waived any lack of personal jurisdiction:

> In *McMillan* v. *Tate*, 260 So.2d 832 (Miss. 1972) this Court said: "While an individual or corporation may appear specifically for the purpose of objecting to the jurisdiction of the court over his person, *he must do so before filing any other pleading.*" 260 So.2d at 833. (Emphasis added.)

361 So.2d at 327.

In *Arrow* the Mississippi Supreme Court did not even discuss whether the Chancery Court could have properly asserted jurisdiction over Arrow Food on any other basis; however, the Court of Appeals believed that the Mississippi Supreme Court had allowed the assertion of jurisdiction under the doing business section of the Long Arm Statute:

> The *Arrow* court further held that section 13-3-57 must be read in conjunction with, and harmonized to, section 79-1-27 of the Mississippi Code Annotated (1972).[2] As a result, personal jurisdiction under a doing business theory was allowed over a Louisiana corporation which did business in Mississippi, even though the tort being sued upon had been committed entirely in Louisiana. *Washington* v. *Norton Mfg., Inc.*, 588 F.2d 441, 446 (5th Cir. 1979). Contrary to the conclusion reached by the district court, therefore, *Arrow* holds that the cause of action need not arise from some purposeful act done by Louisiana Aircraft in Mississippi. In other words, the district court erred in treating the second *Mladinich* requirement as absolute, i.e., insisting upon a *direct* link between

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[2] Section 79-1-27 provided that

> Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.

> Louisiana Aircraft's business activity in Mississippi and the plane crash. *Arrow* teaches us that businessmen who do business in Mississippi or with Mississippi residents will be subject to personal jurisdiction in Mississippi courts at least on causes of action *incident* to such business regardless of whether the action directly arose from a purposeful act done in Mississippi. Personal jurisdiction over Louisiana Aircraft exists in this case because (1) as the district court found, Louisiana Aircraft does business of a systematic and ongoing nature in Mississippi, (2) plaintiff's cause of action is incident to that business activity, and (3) the assertion of jurisdiction over Louisiana Aircraft does not offend notions of fairness or substantial justice.

617 F.2d at 434-435. (App. 5a-6a). (emphasis added).

Assuming that in *Arrow* the Mississippi Supreme Court did indicate in dicta that it would have upheld an assertion of jurisdiction based on a doing business theory, the Court of Appeals still drew an incorrect lesson from the case. The Court of Appeals read *Arrow* as engrafting a novel proposition onto the *Mladinich* test. According to the Court, *Arrow* had amended the *Mladinich* test to require no longer that the course of action "arise from" or be "connected with" the purposeful act or consummated transaction in Mississippi, but instead to require only that the cause of action be "incident" to business done in Mississippi or to business done with Mississippi residents, within or without the state.

Such an interpretation of *Arrow* totally ignores the facts of that case. The Mississippi Supreme Court affirmed the findings of the Trial Court that Arrow had for years been doing extensive business in Mississippi:

> Arrow had sold foodstuffs in Mississippi continuously since 1951. Sales in Mississippi averaged $2,000 to $3,000 a week. A salesman would come to Mississippi and solicit orders. The orders would be filled in Louisiana and shipped by truck to Mississippi purchasers. Sales in Mississippi of $104,000 to $156,000 annually, in our opinion, constitute a substantial amount of business. In April, 1976, $9,000 was owed Arrow by Mississippi purchasers. On June 23, 1976, approximately $3,500 was still owed Arrow by Mississippi purchasers, and two delinquent accounts had been placed in the hands of attorneys for collection. Arrow had used Mississippi's highways for 15 years in delivering foodstuffs sold to Mississippi customers, and now would use Mississippi's courts in collecting debts due it.

361 So.2d at 326.

> [T]he chancellor found that Arrow over the years had done and was still doing a substantial amount of business in Mississippi at the time this cause of action accrued. We cannot say that the chancellor was wrong in his finding.

361 So.2d at 327.

It is true that the tort involved in *Arrow*, which grew from an automobile accident, occurred in Louisiana; however, when the tort occurred, Arrow Food's truck "was en route to Natchez, Mississippi, to deliver refrigerated foods ordered by Mississippi customers of Arrow," 361 So. 2d at 325.

Examining these facts reveals that the *Arrow* decision is completely in line with the *Mladinich* test and does not in any way alter that test. The delivery of foodstuffs in Mississippi constituted the purposeful act or transaction consummated in Mississippi. Unquestionably, the tort was empirically connected with this purposeful act or transaction because the driver of the

Arrow Food truck committed the tort while acting within the scope of his employment while "en route to Natchez, Mississippi, to deliver refrigerated foods ordered by Mississippi customers of Arrow," 361 So.2d at 325. Of course, there were the minimum contacts necessary to satisfy the third prong of the *Mladinich* test.

The Court of Appeals fell into error because it believed that *Mladinich*, prior to *Arrow*, had required that both the purposeful act and the tort occur in Mississippi. On the contrary, *Mladinich* requires only that the tort "arise from" or be "connected with" the purposeful act or consummated transaction occurring in Mississippi. Only the act or transaction must occur in Mississippi. The tort may occur anywhere as long as it "arises from" or is "connected with" the act or transaction. These were and are the unwaivering requirements of *Mladinich* and, as pointed out above, they have been neither altered nor weakened by *Arrow*.

The facts here are completely different from those in *Arrow*. The Plaintiffs allege that Louisiana Aircraft committed a tort in Louisiana by negilgently inspecting the airplane in that State. Assuming this allegation is true, from what purposeful act or consummated transaction, done by Louisiana Aircraft in Mississippi, did this tort arise? The answer is none.

The District Court found that Louisiana Aircraft performed no service or maintenance work in Mississippi. (App. 17a). Louisiana Aircraft did not own, lease or use the airplane. Louisiana Aircraft delivered the airplane to Faulkner in Pennsylvania. 617 F.2d at 433 (App. 3a). The only connection Louisiana Aircraft had with the airplane was the fact that Louisiana Aircraft serviced the airplane in Louisiana, not in Mississippi.

Since the watershed decision in *Mladinich* the Mississippi Supreme Court has consistently required a purposeful act or transaction done in Mississippi and a cause of action arising from, or connected with, *that* purposeful act. The Mississippi Supreme Court has never stated its rationale for this interpretation of the Long Arm Statute; however, one reason may be that the Court does not wish to see Mississippi, with its six-year statute of limitations, become a dumping ground for causes which have accured in other states but which are barred by the shorter statutes of limitations in those states. See *Breland* v. *Hide-Hills Lake, Inc.* 585 F.2d 716 (5th Cir. 1978).

In addition to improperly interpreting *Arrow* and *Mladinich*, the Court of Appeals ignored the plain meaning of the Long Arm Statute itself. The Statute states in part:

> [Any nonresident] who shall do any business or perform any character of work or service *in this state*, shall by *such act or acts* be deemed to be doing business in Mississippi. *Such act or acts* shall be deemed equivalent to the appointment . . . of the secretary of state of the State of Mississippi . . . to be the . . . agent of such nonresident upon whom all lawful process may be served in any actions . . . accrued or accruing from *such act or acts* . . . or as an incident thereto. . . .

§13-3-57 Miss. Code Ann. (1972), (App. 28a), (emphasis added).

Bearing in mind that Long Arm Statutes must be strictly construed because they are in derogation of the common law, *Fliter* v. *Fliter*, 383 So.2d 1084, (Miss. 1980), it is obvious that the noun "incident" as used in the phrase "as an incident thereto" refers to "such act

or acts" which are the act or acts of "business or . . . work or service *in this state*. . . ." §13-3-57 Miss. Code Ann. (1972), (App. 28a), (emphasis added).

Even without the guidance of *Mladinich*, it is clear that this Statute requires the tort to be an "incident" to a purposeful act performed in Mississippi. The Court of Appeals broadly and incorrectly construed this Statute to require only that the tort be incident to business done "in Mississippi or with Mississippi residents . . . regardless of whether the action directly arose from a purposeful act done in Mississippi." 617 F.2d at 435 (App. 6a).

VII.

CONCLUSION

A State is not required by the United States Constitution to assert its jurisdiction to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment, *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), and for at least the past sixteen years Mississippi has desired not to do so. Instead, Mississippi has followed a narrow reading of its restrictive Long Arm Statute, as set forth in *Mladinich*; however, the Court of Appeals by its present decision has wrenched the Mississippi Statute free of these restraints and has stretched it to the very limits of due process.

The Court of Appeals reached its mistaken decision by concluding that *Arrow* had altered the watershed *Mladinich* test. It is interesting to note that if *Arrow* actually wrought the sea-change in Mississippi jurisprudence claimed for it by the Court of Appeals, that fact has completely escaped the notice of the Mississippi Supreme Court. In *Arrow* the Mississippi Court did not feel compelled to overrule, modify, or even discuss *Mladinich* or any one of the forty-eight suc-

ceeding Long Arm cases in which the Court had cited *Mladinich* with approval. It is inconceivable that *Arrow* could be as novel as it was thought to be by the Court of Appeals and could have received so little attention from the Mississippi Supreme Court.

How could a distinguished panel of the Court of Appeals have made such a mistake? Apparently, these judges from Texas and Alabama were mesmerized by the recent decision of this Court in *World-Wide Volkswagen Corp.* v. *Woodson*, _____ U.S. _____, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) with its heavy reliance on the doctrine of minimum contacts in connection with State Long Arm Statutes.

As this Court restrained the State Courts in *World-Wide Volkswagen*, so it should now restrain the Courts of the United States at every level from making overly broad interpretations of the State Long Arm Statutes. In *Mladinich*, the Mississippi Supreme Court laid down a test for determining jurisdiction which continues unaltered until this day. Neither *Arrow* nor any other decision has changed that fact. Because of an erroneous interpretation of *Arrow*, the Court of Appeals has neglected its duty to follow the law of Mississippi as that law actually exists.

To correct this mistake, Louisiana Aircraft requests this Court to reverse the decision of the Court of Appeals and to reinstate the holding of the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

No. 78-2754

C.W. AYCOCK, JR., ET AL

v.

LOUISIANA AIRCRAFT, INC., ET AL.

Appeal From The United States District Court For The Southern District Of Mississippi

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On Petition for Rehearing

August 13, 1980

Before VANCE and SAM D. JOHNSON, *Circuit Judges*, and THOMAS, *District Judge*.

Per Curiam:

IT IS ORDERED that the petition for rehearing filed on behalf of Louisiana Aircraft, Inc. in the above entitled and numbered cause be and the same is hereby denied.

* * *

APPENDIX B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 78-2754

C.W. AYCOCK, JR., ADMINISTRATOR OF THE ESTATE OF JAMES HENRY AYCOCK, DECEASED,
Plaintiff-Appellant,

and

ALIOUS S. ASHLEY *et al.*,
Plaintiffs-Intervenors-Appellants,

and

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Intervenor,

v.

LOUISIANA AIRCRAFT, INC.,
Defendant-Appellee,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Garnishee-Defendant.

May 19, 1980.

* * *

Before VANCE and SAM D. JOHNSON, *Circuit Judges,* and THOMAS, *District Judge.*

VANCE, Circuit Judge:

This appeal presents a single issue: Whether the district court correctly decided that, under Mississippi's long arm statute, section 13-3-57 of the Mississippi Code Annotated (1972), it lacked in personam jurisdiction over Louisiana Aircraft, Inc. We reverse.

On January 19, 1975, a Piper Navajo owned by Faulkner Concrete Products Company of Hattiesburg, Mississippi, crashed in Mobile County, Alabama. The original plaintiffs in

this action were the heirs of John Ashley and John Henry Aycock who died in that crash. They initiated this wrongful death action, section 11-7-13 of the Mississippi Code Annotated (1972), to recover damages from Louisiana Aircraft, which allegedly serviced the aircraft in a negligent manner for Faulkner.[1] Plaintiffs reside in Mississippi, Georgia and Florida. Louisiana Aircraft is a Louisiana Corporation with its principal place of business in Baton Rouge, Louisiana. Although it is not qualified to conduct business in Mississippi, Louisiana Aircraft does business of a "systematic nature" in Mississippi. It is an authorized distributor of Piper Aircraft and parts for the southern two-thirds of Mississippi; it sends its salesmen into Mississippi; its salesmen travel to Mississippi to demonstrate and to sell aircraft to Mississippi residents; it has delivered planes to its customers in Mississippi; it services planes from Mississippi; and it contracts with Mississippi residents. Louisiana Aircraft contends, however that it had no contacts with Mississippi regarding the sale or maintenance of the Faulkner aircraft. Faulkner took delivery of the plane in Pennsylvania and, when the plane required servicing, Faulkner brought it to Baton Rouge where Louisiana Aircraft performed the necessary maintenance work. The alleged basis of Louisiana Aircraft's liability is its negligence in servicing the Faulkner aircraft shortly before the accident. This alleged negligence occurred in Louisiana.

The district court concluded that Mississippi law did not authorize an exercise of in personam jurisdiction over Louisiana Aircraft. It reached this conclusion on the basis of its analysis of section 13-3-57, which states that personal jurisdiction may be had over three categories of defendants.[2] The

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[1] Plaintiffs allege that Louisiana Aircraft either left a screwdriver in the plane's aileron control chain or should have discovered its presence when inspecting the plane in November 1974.

[2] Section 13-3-57 provides in pertinent part that

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and law of this state as to doing business herein, [1] who shall make a contract with a resident of this state to be performed

court determined that Louisiana Aircraft did not fit into any of these categories. Specifically, the court held that the contract section of the long arm statute was inapplicable because no contract existed between the plaintiffs and Louisiana Aircraft.[3] The tort section of the long arm statute was also found to be inapplicable. The trial court reasoned that under Mississippi law Louisiana Aircraft did not fit into this category because the alleged tort of negligence did not occur either in whole or in part in Mississippi. Finally, the court held that personal jurisdiction could not be had over Louisiana Aircraft under the doing business section of the long arm statute. Citing *Mladinich* v. *Kohn*, 250 Miss. 138, 164 So.2d 785, 790 (1964), the court construed this section to require the plaintiffs to demonstrate three things:

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in whole or in part by any party in this state, or [2] who shall commit a tort in whole or in part in this state against a resident of this state, or [3] who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, *or as an incident thereto*, by any such nonresident or his, their, or its agent, servant or employee.

* * *

This doing of such business, or the engaging in any such work or service in this state, or the making of such work or service in this state, or the making of such a contract, or the committing of such tort in this state, shall be deemed to be a signification of such nonresident's agreement that any process against it or its representative which is so served upon the secretary of state shall be of the same legal force and effect as if served on the nonresident at its principal place of business in the state or country where it is incorporated and according to the law of that state or country. (emphasis added).

[3] The trial court did not reach associated issues of privity or the rights of third party beneficiaries, because plaintiffs failed to raise the same.

> (1) The non-resident defendant must "purposely do some act or consumate [sic] some transaction: in Mississippi; (2) the plaintiff's [sic] cause of action "must arise from, or be connected with, such act or transaction"; and (3) the assumption of jurisdiction by the forum state's court must "not offend jurisdicitional notions of fair plan and substantial justice."

The court denied jurisdiction over Louisiana Aircraft because

> the Defendant *has not* done some *purposeful act* in *this State* from which Plaintiffs' cause of action arises . . . [e]ven though the Defendant does some business in Mississippi . . . (emphasis in original).

We do not agree with the district court with respect to its construction of the doing business section of the long arm statute. We do not, therefore, comment on the court's conclusions regarding the other sections. It also is not necessary that we decide whether the district court correctly construed Mississippi cases rendered prior to its decision. Rather we hold that *Arrow Food Distributors* v. *Love*, 361 So.2d 324, 326-26 (Miss. 1978), which was announced after the district court's ruling, requires us to reverse. In *Arrow*, the Mississippi supreme court emphasized "the state's avowed policy as expressed in *Vicksburg S. & P. R. Co.* v. *Forcheimer*, [113 Miss. 531, 74 So. 418, 419 (1917)], to 'open the door' of our Mississippi courts to foreign corporations found doing business in this state to sue and be sued on *all* bona fide causes of action." *Arrow Food Distributors, Inc.* v. *Love*, 361 So.2d at 327 (emphasis added). The *Arrow* court further held that Section 13-3-57 must be read in conjunction with, and harmonized to, section 79-1-27 of the Mississippi Code Annotated (1972).[4] As a result, personal jurisdiction under a

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[4] Section 79-1-27 provided that

> Any corporation claiming existence under the laws of any state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accured in this state or not.

doing business theory was allowed over a Louisiana corporation which did business in Mississippi, even though the tort being sued upon had been committed entirely in Louisiana. *Washington* v. *Norton Mfg., Inc.*, 588 F.2d 441, 446 (5th Cir. 1979). Contrary to the conclusion reached by the district court, therefore, *Arrow* holds that the cause of action need not arise from some purposeful act done by Louisiana Aircraft in Mississippi. In other words, the district court erred in treating the second *Mladinich* requirement as absolute, i.e. insisting upon a *direct* link between Louisiana Aircraft's business activity in Mississippi and the plane crash. *Arrow* teaches us that businessmen who do business in Mississippi or with Mississippi residents will be subject to personal jurisdiction in Mississippi courts at least on causes of action *incident to* such business, note 2 *supra*, regardless of whether the action directly arose from a purposeful act done in Mississippi. Personal jurisdiction over Louisiana Aircraft exists in this case because (1) as the district court found, Louisiana Aircraft does business of a systematic and ongoing nature in Mississippi, (2) plaintiffs' cause of action is incident to that business activity, and (3) the assertion of jurisdiction over Louisiana Aircraft does not offend notions of fairness or substantial justice.[5]

REVERSED AND REMANDED.

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[5] Louisiana Aircraft does not contend that it failed to receive adequate notice of this suit. The constitutionally requisite minimum contacts between Louisiana Aircraft and Mississippi exist; thus, the rule of *Arrow* as applied in this case does not offend due process. See *World-Wide Volkswagen Corp.* v. *Woodson*, _____ U.S. _____, _____, 100 S.Ct 559, 564, 62L.Ed.2d 490 (1980).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. H76-76(R)

C.W. AYCOCK, SR., ADMINISTRATOR OF THE ESTATE OF JAMES HENRY AYCOCK, DECEASED

Plaintiff

AND

AILOUS S. ASHLEY, JOSEPHINE THOMPSON ASHLEY, MARY ELLA OWENS, SADIE LEE LINN, MILMA JOSEPHINE WISELOGEL, THELMA MAY FURLOW, LINDY RUTH BLAKLEDGE, BESSIE FAY STRAW, MARTHA ANN BONE, AND WILLIAM M. ASHLEY

Plaintiffs-Intervenors

AND

INSURANCE COMPANY OF NORTH AMERICA

Plaintiff-Intervenor

V.

LOUISIANA AIRCRAFT, INC.

Defendant

AND

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Garnishee-Defendant

Opinion Of The Court

(Filed May 26, 1970)

Presently under consideration by the Court are separate motions to dismiss, based on different grounds, filed by the Defendants herein. Before addressing these motions, a summary of the facts is given as the basis for this Court's decision.

Plaintiff C. W. Aycock, Sr. initiated his cause of action against the Defendant Louisiana Aircraft and the Jackson Air Center as Garnishee-Defendant. The amended complaint has deleted Jackson Air Center as a defendant herein. The Plaintiff is a resident of Hattiesburg, Mississippi, as was the deceased, James Henry Aycock. The deceased John Ashley was also a Mississippi resident. The Plaintiffs-Intervenors, Ashley's heirs, are ten in number, eight of whom are also Mississippi residents. Martha Ann Bone is a Georgia resident and Bessie Fay Straw lives in Florida. The Plaintiff-Intervenor, Insurance Company of North America (hereinafter INA), is a foreign corporation that is qualified to do business in Mississippi.

The Defendant, Louisiana Aircraft, is a foreign corporation with its principal place of business in Baton Rouge, Louiaiana. Defendant has not qualified to do business in Mississippi. Plaintiffs allege that Louisiana Aircraft has in fact carried on business in Mississippi in a systematic and continuous manner. Defendant Louisiana Aircraft has now admitted that it has conducted some quantity of business in Mississippi of a "systematic nature." The Garnishee-Defendant, Insurance Company of the State of Pennsylvania (hereinafter ICP), is a foreign corporation that is qualified to do business in Mississippi and has its principal place of business in Philadelphia, Pennsylvania.

This cause arises from the crash of a small plane. In October of 1971, the Defendant Louisiana Aircraft sold a new Piper Navajo to Faulkner Concrete Pipe Company, a Mississippi corporation domiciled in Hattiesburg. The purchaser, Faulkner, took delivery of the plane from a manufacturer's outlet in the State of Pennsylvania. The Defendant Louisiana Aircraft did most of the major maintenance work on the Piper and every annual inspection. The last service work on the plane was performed on December 18, 1974. The last annual inspection performed by the Defendant was on November 25, 1974. Defendant alleges that at this time all warranties on the plane and its engines had expired.

Louisiana Aircraft states that all service and maintenance work performed by it on the plane was done in Baton Rouge, Louisiana. Defendant avers that Faulkner would deliver the plane to Louisiana and return to pick it up. Allegedly, no service or maintenance work on the plane was performed in Mississippi.

On January 19, 1975, the Piper left Hattiesburg, Mississippi, piloted by John Ashley and carrying John Henry Aycock as a passenger. While making its final approach to the Fairhope, Alabama airport, the plane crashed in Mobile Bay, killing those on board.

Accordingly, the heirs of the respective decedents have brought wrongful death actions pursuant to Mississippi Code Annotated, §11-7-13 (1972). This Court's jurisdiction is premised upon the parties' diversity of citizenship, 28 U.S.C. §1332(a).

Plaintiffs allege that the plane crash was not due to pilot error, in that John Ashley was a highly competent, experienced and licensed pilot. The Plaintiffs claim that the sole and proximate cause of the crash was the negligence of the Defendant Louisiana Aircraft in leaving a screwdriver in the plane's aileron control chain. Alternatively, Plaintiffs claim that if the screwdriver was already present in the control chain, then Louisiana Aircraft *should have* discovered its presence during the plane's last annual inspection in November of 1974. The Defendant also states that all repair and maintenance work was separate and apart from the contract of sale. Louisiana Aircraft also avers that there was no contract or agreement to inspect or service the plane, all work being done at Faulkner's request.

The Plaintiff-Intervenor, INA, was insurer on behalf of Faulkner. Pursuant to these insurance policies, INA paid over $345,000 to and for the benefit of C. W. Aycock, Sr., Ailous S. Ashley and Faulkner. These parties in turn executed subrogation agreements on behalf of INA. Pursuant to said agreements, INA seeks recourse from Louisiana Aircraft for the amounts paid by INA for the January 1975 plane crash.

Jurisdictional, and other, defects have been raised by the Defendants herein and will be considered separately.

First, ICP argues that it should be dismissed because it does not have in its possession any property or effects that are properly attachable under Mississippi Code Annotated, §11-31-1 (1972). Service on ICP was effected by service on the Mississippi Insurance Commissioner pursuant to Mississippi Code Annotated §83-21-1 (1972). ICP is the insurance carrier for Louisiana Aircraft. Plaintiff's position is that ICP is indebted to Louisiana Aircraft in the amount of $1,000,000.00, the face value of the parties' insurance contract.

The insurance contract that Plaintiffs seek to attach provides that ICP will "pay on behalf of the insured [Louisiana Aircraft] all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law . . ." ICP argues that this obligation is inchoate, and not an attachable debt under Mississippi Code Annotated §11-31-1 (1972). ICP relies upon *Travelers Insurance Co.* v. *Inman*, 126 So. 399 (Miss. 1930).

In *Inman*, the plaintiff was employed by a non-resident company. He was injured and brought suit against his employer and a fellow employee. To establish jurisdiction in Mississippi over his non-resident employer, the plaintiff brought an attachment in chancery, as in the case *subjudice*, against his employer's workmen's compensation insurance carrier. That insurance policy also provided that no liability on the insurance company's part would arise "until there had been a definitely ascertained and legally fixed liability against the employer . . ." *Id.* at 400. In reversing the lower court's judgment in plaintiff's favor, the Mississippi Supreme Court, through Justice Griffith, stated:

> "In the very nature of things, a party may not be made a defendant in an attachment in chancery on the ground that he is indebted to the principal defendant, unless at the time of filing the suit the garnishee-defendant be actually obligated to the principal defendant in an

> ascertained or ascertainable existing debt — not that he might later become so indebted or that on the future fulfilment of certain contingencies he will be indebted. A fortiori he cannot be made a party as a debtor to the principal defendant when the fact vel non of the garnishee's indebtedness is dependent upon whether the principal defendant shall be adjudged to be indebted to the complainant, which adjudication necessarily must come after the filing of the suit." *Id.* at 400-01.

Therefore, as in *Inman*, the *present* legal liability of the insurance company to its insured is ". . . only an undetermined possibility, an inchoate thing, in fieri." *Id.* at 400. Also, as far as this Court's (independent) research disclosed, *Inman* is still viable precedent in Mississippi.

Plaintiffs have a dual rejoinder to the above argument of ICP, the first being premised upon *American National Insurance Co. v. U.S.F.&G. Co.*, 215 So.2d 245 (Miss. 1968). That case upheld a judgment creditor's right to garnish the underwriter of a fidelity bond, the Court stating:

> "On the other hand, *where there is no contingency as to* the garnishee's *liability*, the only contingency being as to the amount of it, and where the amount of liability of definite ascertainment, there is no such contingency to prevent garnishment of the claim. . . ." *Id.* at 248 (Emphasis added).

Plaintiffs argue that this is such a proper case where the insurance obligation is attachable. Though not expressly stated, implicit in this argument is the proposition that the Defendant Louisiana Aircraft's liability is a foregoine conclusion, with damages greatly in excess of the policy limits, thereby making the "liability" capable of ascertainment [*i.e.*, the policy's face amount].

This Court must disagree. Contrary to Plaintiff's assertions, *Inman*, *supra*, is the more appropriate authority here. *American National*, *supra*, is readily distinguishable in that the attempted garnishment rested on a previously

rendered judgment against the judgment debtor, the defendant U.S.F.&G.'s obligee.

The Plaintiff's second contention here is that under the aforementioned insurance agreement, ICP had an obligation to "defend and indemnify" the Defendant Louisiana Aircraft. Plaintiffs argue that these contractual duties are "debts" owing to Louisiana Aircraft, and therefore subject to attachment under Mississippi Code Annotated §11-31-1 (1972).

In support of this argument, Plaintiffs rely on *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). In *Seider*, two New York residents (plaintiffs) were injured in an automobile crash in another state. To establish jurisdiction over one of the nonresident defendants, the plaintiffs attacked the insurance policy of said defendant. As in the case *sub judice*, the insurance company was qualified and doing business in the forum state. Moreover, as Plaintiffs herein have attempted, the *Seider* plaintiffs attacked the insurance company's obligation to "defend and indemnify" its insured. The New York Court of Appeals, that State's highest Court, held that the contractual obligations to defend and indemnify the insured *were* attachable "debts" under *that State's attachment laws.*

Plaintiffs also refer this Court to *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1969), as evidence of *Seider's* viability. *Rosenberg*, *supra*, upheld the procedure validated in Seider against constitutional challenges based upon, *inter alia*, due process precepts.

However, *Rosenberg* and *Seider* deal with the law of New York, not Mississippi. In this diversity case, this Court is bound by the doctrines enunciated in *Erie RR. Co. v. Tompkins*, 304 U.S. 64 (1938). Most imperative is the duty to apply the laws of the forum state *as they exist*, and not according to what a District Court feels the law *should be*. Accordingly, this Court is of the opinion that *Inman*, *supra*, states the correct rule of law to be applied in the present case. Furthermore, this Court's research discloses that New York

stands alone in the concepts and procedures endorsed in *Seider*, *supra*. To paraphrase the Fifth Circuit, nor does *this* Court feel that the Mississippi Supreme Court would endorse or support the *Seider* view. *See Kirchman v. Mikula*, 443 F.2d 816, 817 (5th Cir. 1971).

This Court also disagrees with Plaintiff's assertion that the Fifth Circuit has, by implication, endorsed the New York procedure upheld in *Seider* and *Rosenberg*, *supra*. *Steele v. G. D. Searle & Co.*, 483 F.2d 339, 348 (5th Cir. 1973). Defendant ICP's position herein is completely different from the constitutional objections voiced in *Searle*. Plaintiff's argument is based on the Fifth Circuit's citation of *Rosenberg* and both Courts' opinion that such attachments are constitutional ". . . so long as Harris v. Balk . . . stands." *Id.* at 348. This Court rejects Plaintiff's argument for two reasons. First, this Court does not construe the reference to *Rosenberg* as adopting *in toto* the Second Circuit position. The reference to *Rosenberg* was, as aforestated, in the context of a constitutional challenge and not, as in the instant case, whether under Mississippi chancery attachment suits the insurance policy involved herein fs a "debt" within the Mississippi attachment statute. Second, the continued validity of *Harris v. Balk*, 198 U.S. 215 (1905), is questionable. *See Shaffer v. Heitner*, 433 U.S. 186 (1977).

Accordingly, this Court holds that the insurance policy involved herein is not an attachable "debt" under the Mississippi attachment statute, Mississippi Code Annotated §11-31-1 (1972). The Defendant ICP's motion is therefore well taken, and hereby granted. Furthermore, the attachment having failed, this Court lacks any *quasi in rem* jurisdiction over the Defendant Louisiana Aircraft. As a final note, the chancery attachment statute has been held violative of the due process clause. *Mississippi Chemical Corp. v. Chemical Constr. Corp.*, 444 F.Supp. 925 (S.D. Miss. 1977). Thus, at present the entire attachment procedure is subject to doubt. However, this Court should not be misunderstood as basing its holding on constitutional grounds.

Remaining for consideration are the contentions of the Defendant Louisiana Aircraft. Defendant has appeared specially contesting venue and jurisdiction in this Court.

Initially, the Defendant Louisiana Aircraft states that venue in the Southern District of Mississippi is improper and prays for a dismissal under 28 U.S.C. §1406(a) or, alternatively, for a transfer to the Middle District of Louisiana pursuant to 28 U.S.C. §§1404(a), 1406(a). Louisiana Aircraft argues that it neither incorporated nor licensed to do business in Mississippi. It then asserts that it may *only* be sued where licensed or incorporated, as set forth in 28 U.S.C. §1391(c). This Court disagrees. Defendant's argument overlooks 28 U.S.C. §1391(a), which provides that in a diversity case suit may be brought where the plaintiff resides, where the defendant resides, or where the cause of action arose. Therefore, §1391(c) supplements §1391(a) and sets forth the criteria for the "residence" of a corporate defendant. This section is applicable when a plaintiff chooses to bring his diversity action where the defendant resides. Thus, §1391(c) can not be used to defeat the plaintiff's choice of forum, in the present case being the State of their residence. *See e.g.*, *Miles* v. *Charles E. Smith Companies*, 404 F.Supp. 467, 470 n.6 (D. Md. 1975). Though not raised by the Defendants, two of the Plaintiffs herein are non-residents. Thus, all Plaintiffs do not reside in this judicial district. However, Plaintiff's argument, set out *infra*, that their claim accrues under the Mississippi Wrongful Death Act, Mississippi Code Annotated §11-7-13 (1972), discloses that this is the judicial district in which the cause of action accrued within the meaning of 28 U.S.C. §1391(a).

Given the foregoing, the Defendant's *objection to venue is overruled.* Also, given the existence of proper venue herein, the Defendant's motion for dismissal under 28 U.S.C. §1406(a) is similarly denied. Finally, the Court finds that the alternative motion to transfer is dependent upon resolution of the jurisdictional objections, and is therefore set forth, *infra.*

Louisiana Aircraft also asserts that the complaint fails to state a claim upon which relief may be granted, Rule 12(b)(6) F.R.Civ.Pro. Defendant states that INA has brought suit against it in the Middle District of Louisiana, being Cause No. 76-7 before said Court. That suit seeks recovery for the amounts already paid by INA to the Plaintiffs herein. Defendant argues that since that suit will involve the same issues, facts and witnesses, the present cause therefore contravenes Mississippi Code Annotated §11-7-13 (1972). Said section provides that ". . . there shall be *but one (1) suit for the same death* which shall ensue for the benefit of all parties concerned . . ." The Defendant's argument is meritless for several reasons. First, INA's independent action in Louisiana is not a wrongful death suit. Second, INA has also intervened in the present cause. Records from the Middle District of Louisiana also disclose that that cause has not proceeded much further than this one. Thus, Defendant's assertion is refuted by the statute itself which also provides that a subsequent, or concurrent, wrongful death action is not barred absent an adjudication *on the merits* in the first cause. *See id.* Therefore, under the standards as set forth in *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957), the Defendant's motion per Rule 12(b)(6) is denied.

Louisiana Aircraft also objects to Plaintiff's utilization of the Mississippi long-arm statute, Mississippi Code Annotated §13-3-57, to obtain in personam jurisdiction over it in this Court. The long-arm statute provides three categories of non-resident defendants over whom personal jurisdiction may be obtained. They are:

(1) Non-residents who do any business or perform any character of work or service in Mississippi; or

(2) Non-residents who make a contract with a Mississippi resident, and the contract is performed, in whole or in part, by either party in the State of Mississippi; or

(3) Non-residents who commit a tort, in whole or in part in this State, against a Mississippi resident.

See generally Chromcraft Corp. v. *Mirox, S. A.*, 446 F.Supp. 342 (N.D. Miss. 1977). Plaintiffs have alleged a jurisdictional basis on all three grounds and they are discussed seriatim.

Plaintiffs allege, and Louisiana Aircraft concedes, that the Defendant in fact transacts some business in this State. Once again, under *Erie, supra*, this Court looks for guidance to pertinent Mississippi decisional law. Controlling here is *Mladinich v. Kohn*, 164 So.2d 785 (Miss. 1964). *Mladinich* sets forth a tripartite test for application of the "doing business" section of the long-arm statute, to-wit: (1) the non-resident defendant must "purposely do some act or consumate some transaction" in Mississippi; (2) the plaintiff's cause of action "must arise from, or be connected with, such act or transaction"; and (3) the assumption of jurisdiction by the forum state's court must "not offend jurisdictional notions of fair play and substantial justice . . ." 164 So.2d at 790.

Applied to the present case, this Court believes that Plaintiffs' effort on this ground must fail. The Plaintiffs charge the Defendant with negligence in leaving a screwdriver in the plane's controls. The record indicates that, even assuming such to be true, the act would have occurred in Louisiana. No service or maintenance work was performed in Mississippi. Thus, the Defendant *has not* done some *purposeful act* in *this State* from which Plaintiffs' cause of action arises. *See Holvitz v. Norfleet-Ashley, Inc.*, 369 F.Supp. 394 (N.D. Miss. 1973). Even though the Defendant does some business in Mississippi, *Mladinich* precludes the assertion of in personam jurisdiction over it based upon the "doing business" section of the long-arm statute.

Plaintiffs' next argument is that the maintenance services performed by Louisiana Aircraft were done pursuant to a *contract*, said contract *originating* in Mississippi with the scheduling of the maintenance services. Delivery of the plane, from Hattiesburg, Mississippi to Baton Rouge, Louisiana, ac-

cording to Plaintiffs, constituted part performance within the State of Mississippi.

Defendant argues that the Plaintiffs have not shown the existence of such a contract. Notwithstanding the above arguments, this Court perceives a fatal weakness in the Plaintiffs' attempt to establish jurisdiction on this ground. The long-arm statute, by its very terms, requires a contract with a Mississippi resident. Unquestionably, the majority of the Plaintiffs herein are Mississippi residents. However, Plaintiffs have not shown, nor does the Court believe they could, the existence of a contract between *themselves* (or some of them) *and* the Defendant *Louisiana Aircraft*. The "contract" section of the long-arm statute requires such a relationship. *Cf. Kaydee Metal Prods. Corp. v. Sintex Mach. Tool Mfg. Corp.*, 342 F.Supp. 902 (N.D.Miss. 1972). The reach of the long-arm statute can not be expanded so as to allow a plaintiff to utilize said statute when he is not a party to said contract. The Court recognizes potential problems concerning privity and third-party beneficiary concepts. However, the parties herein have not raised such issues, the Mississippi Supreme Court has not addressed them, and this Court will not, *sua sponte*, so engage itself. Plaintiffs' reliance on *Miller* v. *Glendale Equip. & Supply Co.*, 344 So.2d 736 (Miss. 1977) is misplaced. Briefly, *Miller* is distinguishable from the present case in that the plaintiff Miller was one of the contracting parties; the Plaintiffs herein were not. Accordingly, under the facts of this case, this Court holds the "contract" section of the long-arm statute inapplicable.

Remaining for consideration is Plaintiffs' assertion that the Defendant Louisiana Aircraft committed a tort, in whole or in part, in this State against a Mississippi resident. This is a difficult question, it appearing to the Court that the issue is one of first impression. Louisiana Aircraft argues that under the facts of this case, any alleged tort could *only* have taken place in Louisiana or Alabama.

Plaintiffs' argument is novel. The argument may be set forth as:

(1) A claim for wrongful death is an entirely new cause of action, distinct from the decedent's estate, that inures to the statutory heirs [Plaintiffs], *Byars* v. *Austin*, 218 So.2d 11,15 (Miss. 1969);

(2) The Defendant's negligence destroyed the relationships between the Plaintiffs herein and their respective decedents, the basis for complaint under the wrongful death statute;

(3) The *impact and ramifications* of Defendant's negligence are felt in Mississippi; and, therefore

(4) The Defendant Louisiana Aircraft has committed a tort, at least in part, within this State.

Louisiana Aircraft emphasizes its position by analyzing the various elements of the tort [negligence] alleged. These elements include:

(1) Duty;

(2) Breach of duty under the appropriate standard of care;

(3) Proximate cause; and

(4) Resultant injury or damage.

See generally Prosser, *Law of Torts* §30 at 143 (4th Ed. 1971).

Louisiana Aircraft asserts that its "duty" arose when it undertook the repair and inspection, *i.e.*, Baton Rouge, Louisiana. However, the record also reflects that Faulkner took the initiative in these circumstances and would call the Defendant to set a date for the maintenance work and then would deliver the plane to the Defendant's Louisiana facility.

Defendant next asserts that any breach of duty or omission on its part took place during the repair or inspection; again Baton Rouge. Finally, Defendant asserts that the damage, if any, occurred in Alabama, site of the plane crash. Louisiana Aircraft relies on *Edwards* v. *A. P.*, 512 F.2d 258 (5th Cir. 1975); *Dawkins* v. *White Products Corp.*, 443 F.2d 589 (5th Cir. 1971); *Smith* v. *Temco, Inc.*, 252 So.2d 212

(Miss. 1971). All three cases rely upon the "tort" provision of the long-arm statute. *Edwards* was a libel action, the other two were products liability cases and hence not on all fours with the present case. Nevertheless, all three courts upheld the use of the long-arm statute under the facts of those cases.

Certain principles from the above cited cases are relevant here. These principles are taken upon the premises that the courts of this State have a preference for a liberal construction of the long-arm statute in favor of resident plaintiffs. *See, e.g., McAlpin v. James McKoane Enterprises, Inc.*, 395 F.Supp. 937, 943 (N.D. Miss., 1975).

In *Smith* v. *Temco, supra* a products liability case, a wall heater manufactured by the defendant allegedly caused a fire in the plaintiff's home. Addressing the issue presented herein, that Court stated:

> "The tort is not complete until the injury occurs, and if the injury occurs in this State, then, under the [long-arm] statute, the tort is committed, at least in part, in this State . . ." 252 So. 2d at 216.

The logic of *Smith* was extended to a libel action by the Fifth Circuit in *Edwards, supra*, 512 F.2d at 263.

The problem presented to this Court is whether a tort was committed, *at least in part*, in the State of Mississippi. Beyond cavil, the fatal crash occurred in Alabama. However, "[t]here is no statutory requirement that the part of the tort which causes the injury be committed in Mississippi . . ." *Breedlove* v. *Beech Aircraft Corp.*, 334 F.Supp. §1361, 1365 (N.D. Miss. 1971). *Breedlove* was a products liability case where the plane *crashed in Arkansas*. That Court held that an *element* of strict liability in tort is the placing of a product in the stream of commerce and its ultimate delivery in Mississippi. *See id.* at 1365.

Plaintiffs' cause of action is based upon the distinction of their relationships with the decendents. *See Thornton* v. *Ins. Co. of North America*, 207 So.2d 262 (Miss. 1973). Undoubtedly, the *effects or ramifications* of the Defendant's

alleged negligence will be felt in Mississippi, by Mississippi residents. However, based upon the foregoing facts and law, this Court can still not perceive that *any part* of the alleged tort took place in Mississippi. The ramifications of a tortious act do not equate with its commission. For example, A, a Mississippi resident, is killed in a car accident due to the negligence of B, a Texas resident. The accident occurs in California. A's heirs then bring a wrongful death action in Mississippi, asserting the same jurisdictional grounds as the Plaintiffs herein. Certainly, the effects of B's tortious act are felt in Mississippi, but can it fairly be said that he committed a tort, *in whole or part*, in Mississippi? This Court thinks not. Nor does the Court feel that the applicability of the hypothetical to the present case is weakened by the close proximity of the three sister States involved herein. *Smith* v. *Temco, supra*, has held that a tort is completed when injury occurs. The injury here occurred in Alabama. Even the most negligent act is not actionable absent injury. *See generally* Prosser, supra. This would be a different case had the plane crashed in this State; but it did not.

The Plaintiffs' argument that the Defendant's actions casued "effects" in Mississippi sufficient to support jurisdiction in this State does not, therefore, find support in Mississippi law. *Erie, supra.* The Court does note that a similar 'effect' argument was presented, and rejected, by the United States Supreme Court. *Kulko* v. *Superior Court*, 46 U.S.L.W. 4421 (May 15, 1978).

Having delved this far, the Court feels compelled to address another issue. INA is also a plaintiff herein. INA's right to sue is based upon subrogation, both legal and conventional. In Mississippi, a subrogee [INA] has the benefit of all remedies available to the subrogor [Faulkner], '. . . and *may use all of the means which the subrogor could employ* to enforce payment . . .'' *American National Ins. Co.* v. *U.S.F.&G.*, 215 So.2d 245, 250 (Miss. 1968) (Emphasis added). The net effect is one of "full substitution", the

subrogee stands in the shoes of the subrogor. *Id. See* generally 73 Am. Jur.2d, *Subrogation* §§106-07 (1974).

Therefore, as the Court perceives the issue, the question is whether *Faulkner*, INA's subrogor, could avail itself of this State's long-arm statute. This Court is of the opinion that Faulkner could. Although not evidenced in a writing, Louisiana Aircraft and Faulkner had an agreement whereby Defendant serviced the plane. Negotiations were initiated by Faulkner in Mississippi, the plane was taken to Louisiana from this State, and most likely the payments for such services were sent from Faulkner's Mississippi location. Therefore, there did exist a contract, *performable at least in part* in Mississippi. Faulkner could, therefore, utilize the long-arm statute. So too may its subrogee, INA, the Plaintiff-Intervenor herein. To say that INA is fully vested with Faulkner's rights and remedies, and yet deny INA the procedural mechanising of the long-arm statute would produce an anomolous and unwarranted result.

Remaining is Defendant's motion for a change of venue. First, since this Court has previously determined that venue was proper herein, 23 U.S.C. §1406(a) is by its terms inapplicable. *See Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 468 (1962) (Harlan, J. dissenting). As to the transfer under 28 U.S.C. §1404(a), the Court finds a split of authority as to whether a court that lacks personal jurisdiction over the defendant may nevertheless transfer a case. *See generally* Annot., 7 A.L.R. Fed. 9, 38-42 (1971). Notwithstanding such uncertainty, a transfer is still discretionary with this Court. In this case, the Court feels that it is best to deny the Defendant's motion to transfer. Louisiana is not the only forum available to the Plaintiffs herein.

The parties may submit an appropriate order within the time allowed by the local rules of this Court.

DAN M. RUSSELL, JR.
United States District Judge

DATE: May 26, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. H76-76(R)

C.W. AYCOCK, SR., ADMINISTRATOR OF THE ESTATE OF JAMES HENRY AYCOCK, DECEASED

Plaintiff

AND

AILOUS S. ASHLEY, JOSEPHINE THOMPSON ASHLEY, MARY ELLA OWENS, SADIE LEE LINN, MILMA JOSEPHINE WISELOGEL, TEHLMA MAY FURLOW, LINDY RUTH BLAKLEDGE, BESSIE FAY STRAW, MARTHA ANN BONE, AND WILLIAM M. ASHLEY

Plaintiffs-Intervenors

AND

INSURANCE COMPANY OF NORTH AMERICA

Plaintiff-Intervenor

V.

LOUISIANA AIRCRAFT, INC.

Defendant

AND

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Garnishee-Defendant

Opinion Of The Court

Filed June 19, 1978

This supplemental opinion is issued to clarify some confusion engendered by this Court's previous opinion rendered May 26, 1978. At page 14 of said opinion, this Court addressed INA's status as the subrogee of Faulkner. The question that has arisen is whether or not the plaintiff-intervenor INA has utilized the long-arm statute, Miss. Code Ann. §13-3-57 (1972), so as to obtain in personam jurisdiction over Louisiana Aircraft.

To address this issue, a brief chronology of the case *sub judice* is appropriate. The original action was brought in July of 1976. Process was thereafter served on Louisiana Aircraft's registered agent, Joseph Rockholt, in Baton Rouge, Louisiana.

On October 28, 1976, INA filed its motion to intervene. On the same date, plaintiff Aycock served the Mississippi Secretary of State pursuant to the long-arm statute. By letter dated November 2, 1976, the Secretary of State notified the clerk's office that it had served the aforementioned process on Rockholt.

On November 2, 1976, Ashley's heirs and INA brought forth their motions to intervene before Magistrate Roper. The clerk's sheet, part of the record herein, indicates that both motions were granted from the Bench. On December 20, 1976, an order was entered allowing Ashley's heirs to intervene. The Court, after diligent inquiry, has been unable to find an order allowing INA to intervene, the previous Bench ruling notwithstanding.[1]

On March 17, 1977, the amended complaint was filed. This amended complaint added ICP as garnishee-defendant, and also requested that process be served pursuant to the long-arm statute. Thereafter, summons was issued to ICP and on March 24, 1977, process was served on the Mississippi Insurance Commissioner. The Insurance Commissioner was served with the writ of attachment on April 7, 1977. The record does not disclose any subsequent service of process on the Secretary of State, or process served at INA's behest.

Counsel for Louisiana Aircraft opined that given plaintiff Aycock's failure to obtain jurisdiction over Louisiana

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[1] The Court cannot explain the absence of said order. As an administrative matter, the Court realizes that papers sometimes get "lost in the shuffle". The parties apparently concede that such an order was entered. *See* counsel for defendant's letter to the Court, dated June 12, 1978.

Aircraft, the entire cause should be dismissed. It is true that intervention presupposes an action in a court of competent jurisdiction. However, where an intervenor has an independent basis for jurisdiction, the Court need not dismiss the action in toto when the initial plaintiff's claim fails on jurisdictional grounds. *See* 7A Wright & Miller, *Federal Practice and Procedure*, §1917 at 584-86 (1972). INA has such an independent basis, given the parties diversity of citizenship. 28 U.S.C. §1332.

Next, the Court must consider whether INA has obtained personal jurisdiction over Louisiana Aircraft in this Court. As noted previously, INA did not independently serve process on the Mississippi Secretary of State. Defendant Louisiana Aircraft was, however, served with a copy of the amended complaint.[2] Plaintiff Aycock effected service on the Secretary of State, as authorized by the long-arm statute and F.R.Civ.P. 4(d)(7),(e), after the initial complaint was filed and before the amended complaint was filed.[3]

Under Rule 5, F.R.Civ.P., if a pleading asserts new or additional claims for relief against a *party in default*, then the intervenor must serve original process pursuant to Rule 4. The defendant herein is not in default, and has entered its appearance, albeit specially to contest jurisdiction. Therefore, original process is not necessary.

> "In all other cases service is sufficient if made upon the attorney for a party who has appeared, or upon the party himself, in the manner set out in Rule 5(b) . . . Service in accordance with Rule 5(b) on the attorneys for these parties who have appeared in sufficient." 7A Wright & Miller, *supra*, §1919 at 610.

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[2] This is the only logical conclusion, even though the amended complaint does not contain a certificate of service to opposing counsel, and, as noted above, new process was not served on the defendant Louisiana Aircraft.

[3] The Mississippi Secretary of State was served three months after the initial complaint was filed. This service was some four and one-half months before the filing of the amended complaint.

Moreover, the case *sub judice* does not fall within the caveat noted by the authors. *See id.* The Court has not found a case on point, however, *City of Philadelphia* v. *Morton Salt Co.*, 248 F.Supp. 506 (E.D. Pa. 1965), is analogous. In that case, plaintiff brought an antitrust class action. The intervenors served their complaints on one of the defendants by serving that defendant's attorney of record. The Court upheld the intervenors' service of process as proper and accordingly denied the defendant's motion to quash.

Therefore, based upon the foregoing, this Court is of the opinion that INA has validly obtained personal jurisdiction over Louisiana Aircraft. Accordingly, as between INA and Louisiana Aircraft, a viable and pending proceeding remains. This result follows notwithstanding the subsequent denial of plaintiff's attempt under the long-arm statute. The foregoing should explain any embiguity in this Court's initial opinion.

Finally, Louisiana Aircraft strenuously objects to the motion to stay entry of the order in accordance with the Court's initial opinion filed by the plaintiff Aycock and Ashley's heirs. This Court is in agreement with defendant on this point. The Court's order will be entered forthwith in accordance with the local rules of this Court. The parties have various alternatives available: for example, by appropriate motion at this Court's next regularly scheduled motion day.

DAN M. RUSSELL, JR.
United States District Judge

DATE: June 16, 1978

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. H76-76(R)

C.W. AYCOCK, ET AL

Plaintiffs

v.

LOUISIANA AIRCRAFT, INC.

Defendant

Opinion Of The Court

Presently under consideration by the Court is a motion by the heirs of Aycock and Ashley whereby they seek leave to intervene pursuant to Rule 24(b), F.R.Civ.P. This Court agrees with the plaintiffs-intervenors on several points, *i.e.*, there *are* common questions of law or fact involved and their petition was timely filed. However, the motion to intervene must be denied because ". . . there must be independent jurisdictional grounds for permissive intervention under Rule 24(b), ..." 7A Wright and Miller, *Federal Practice and Procedure*, §1917 at 592 (1972). *Accord Blake* v. *Pallan*, 554 F.2d 947, 955-56 (9th Cir. 1977).

In the present case, the very basis of this Court's initial opinion was that the Aycock and Ashley heirs could *not* avail themselves of the state long-arm statute so as to obtain jurisdiction over Louisiana Aircraft in this Court. Accordingly, since they *still* may not, they have no independent jurisdictional basis to support their petition for intervention. This result follows *even though* complete diversity exists and *more than* $10,000 is involved.

The plaintiffs-intervenors' alternative motion to transfer has been withdrawn and therefore has not been considered by the Court.

DAN M. RUSSELL, JR.
United States District Judge

Gulfport, Mississippi
DATE: July 24, 1978

APPENDIX E

§13-3-57. Service when defendant is nonresident doing business in state-appointment of secretary of state as agent.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident in the same manner as hereinbefore provided in the case of process or summons upon the nonresident and when such process or summons is served, made or had against the nonresident executor, administrator, receiver, trustee, or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi, jurisdiction over the cause of

action and other such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved.

The doing of such business, or the engaging in any such work or service in this state, or the making of such contract, or the committing of such tort in this state, shall be deemed to be a signification of such nonresident's agreement that any process against it or its representative which is so served upon the secretary of state shall be of the same legal force and effect as if served on the nonresident at its principal place of business in the state or country where it is incorporated and according to the law of that state or country.

Service of any process herein provided for to be made upon the secretary of state shall be made in like manner and procedure, inclusive of notice of service, and with the same force and effect, as is provided by law for service on nonresident motorist defendants under section 13-3-63, provided, however, that service of process may be had in any county of the state where the defendants, or any of them, may be found.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commended against him even though said person was a resident at the time any action or proceeding accrued against him.

APPENDIX F

§79-1-27. Foreign corporations subject to suit in this state.

Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.